

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 20, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MECHELLE H.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-cv-03220-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 19, 21

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 19, 21. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing,

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
2 motion, ECF No. 19, and denies Defendant's motion, ECF No. 21.

3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
5 1383(c)(3).

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
16 impairment must be "of such severity that he is not only unable to do his previous
17 work[,] but cannot, considering his age, education, and work experience, engage in
18 any other kind of substantial gainful work which exists in the national economy."
19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis
9 proceeds to step two. At this step, the Commissioner considers the severity of the
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
11 claimant suffers from "any impairment or combination of impairments which
12 significantly limits [his or her] physical or mental ability to do basic work
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to
17 severe impairments recognized by the Commissioner to be so severe as to preclude
18 a person from engaging in substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
20

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant's age,

1 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
5 work, analysis concludes with a finding that the claimant is disabled and is
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.
8 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
9 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
10 capable of performing other work; and 2) such work “exists in significant numbers
11 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
12 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

13 ALJ’S FINDINGS

14 On October 14, 2015, Plaintiff applied both for Title II disability insurance
15 benefits and Title XVI supplemental security income benefits alleging a disability
16 onset date of January 30, 2014. Tr. 112, 237-48. The applications were denied
17 initially and on reconsideration. Tr. 139-42; Tr. 147-51. Plaintiff appeared before
18 an administrative law judge (ALJ) on May 1, 2018. Tr. 35-83. On September 14,
19 2018, the ALJ denied Plaintiff’s claim. Tr. 12-34.

At step one of the sequential evaluation process, the ALJ found Plaintiff, who met the insured status requirements through March 31, 2019, has not engaged in substantial gainful activity since January 30, 2014. Tr. 17. At step two, the ALJ found that Plaintiff has the following severe impairments: carpal tunnel syndrome, asthma, anxiety disorder, major depressive disorder, post-traumatic stress disorder, and substance abuse disorder. *Id.*

At step three, the ALJ found Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 18. The ALJ then concluded that Plaintiff has the RFC to perform light work with the following limitations:

[Plaintiff] can frequently climb ramps and stairs. She can frequently balance, stoop, kneel, and crouch. [Plaintiff] cannot climb ladders, ropes, and scaffolds or crawl. She can frequently handle and finger. [Plaintiff] must avoid concentrated exposure to extreme cold, vibrations, and hazards. [Plaintiff] can perform simple, routine tasks and follow short, simple instructions. She can do work that needs little or no judgment and can perform simple duties that can be learned on the job in a short period. [Plaintiff] requires a work environment with minimal supervisor contact. (Minimal contact does not preclude all contact; rather it means contact does not occur regularly. Minimal contact also does not preclude simple and superficial exchanges and it does not preclude being in proximity to the supervisor). [Plaintiff] can work in proximity to coworkers but not in a cooperative or team effort. She requires a work environment that has no more than superficial interactions with coworkers. [Plaintiff] requires a work environment that is predictable and with few work setting changes. She requires a work environment without public contact.

1 Tr. 20.

2 At step four, the ALJ found Plaintiff is unable to perform any of her past
3 relevant work. Tr. 26. At step five, the ALJ found that, considering Plaintiff's
4 age, education, work experience, RFC, and testimony from the vocational expert,
5 there were jobs that existed in significant numbers in the national economy that
6 Plaintiff could perform, such as small products assembler, marker, and garment
7 sorter. Tr. 27. Therefore, the ALJ concluded Plaintiff was not under a disability,
8 as defined in the Social Security Act, from the alleged onset date of January 30,
9 2014, through the date of the decision. Tr. 28.

10 On July 15, 2019, the Appeals Council denied review of the ALJ's decision,
11 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
12 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

13 ISSUES

14 Plaintiff seeks judicial review of the Commissioner's final decision denying
15 her disability insurance benefits under Title II and supplemental security income
16 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
17 issues for review:

- 18 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 19 2. Whether the ALJ properly evaluated lay witness evidence; and
- 20 3. Whether the ALJ properly evaluated medical opinion evidence.

1 ECF No. 19 at 4-21.

2 **DISCUSSION**

3 **A. Plaintiff's Symptom Claims**

4 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
5 convincing in discrediting her symptom claims. ECF No. 19 at 4-14. An ALJ
6 engages in a two-step analysis to determine whether to discount a claimant's
7 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
8 "First, the ALJ must determine whether there is objective medical evidence of an
9 underlying impairment which could reasonably be expected to produce the pain or
10 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
11 "The claimant is not required to show that [the claimant's] impairment could
12 reasonably be expected to cause the severity of the symptom [the claimant] has
13 alleged; [the claimant] need only show that it could reasonably have caused some
14 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

15 Second, "[i]f the claimant meets the first test and there is no evidence of
16 malingering, the ALJ can only reject the claimant's testimony about the severity of
17 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
18 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
19 omitted). General findings are insufficient; rather, the ALJ must identify what
20 symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
2 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
3 explain why it discounted claimant’s symptom claims)). “The clear and
4 convincing [evidence] standard is the most demanding required in Social Security
5 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
6 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

7 Factors to be considered in evaluating the intensity, persistence, and limiting
8 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
9 duration, frequency, and intensity of pain or other symptoms; 3) factors that
10 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
11 side effects of any medication an individual takes or has taken to alleviate pain or
12 other symptoms; 5) treatment, other than medication, an individual receives or has
13 received for relief of pain or other symptoms; 6) any measures other than treatment
14 an individual uses or has used to relieve pain or other symptoms; and 7) any other
15 factors concerning an individual’s functional limitations and restrictions due to
16 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
17 404.1529(c), 416.929(c). The ALJ is instructed to “consider all of the evidence in
18 an individual’s record,” to “determine how symptoms limit ability to perform
19 work-related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

1 The ALJ found that Plaintiff's medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
3 statements concerning the intensity, persistence, and limiting effects of her
4 symptoms were not entirely consistent with the evidence. Tr. 22.

5 *1. Objective Evidence*

6 The ALJ found Plaintiff's symptom complaints are inconsistent with the
7 objective evidence. Tr. 20-23. An ALJ may not discredit a claimant's symptom
8 testimony and deny benefits solely because the degree of the symptoms alleged is
9 not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853,
10 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991);
11 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*, 400 F.3d at 680.
12 However, the objective medical evidence is a relevant factor, along with the
13 medical source's information about the claimant's pain or other symptoms, in
14 determining the severity of a claimant's symptoms and their disabling effects.
15 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

16 The ALJ found Plaintiff's physical symptom complaints are out of
17 proportion with her typically unremarkable presentation during treatment visits.
18 Tr. 23. While Plaintiff alleges difficulty walking for prolonged periods due to
19 asthma, she generally had normal breathing with clear lungs and no wheezing,
20 including an appointment where she reported daily use of her inhaler and dyspnea,

1 and she had a normal gait. Tr. 20-21, 23 (citing Tr. 378, 385, 555-59, 611, 618).
2 Plaintiff also had a normal pulmonary function test. Tr. 21, 23 (citing Tr. 618).
3 Plaintiff reports difficulty lifting items and using her hands due to carpal tunnel,
4 but she had normal strength, tone and range of motion in her upper extremities,
5 though she had a positive Phalen's and Finkel's on one examination. Tr. 20-21, 23
6 (citing Tr. 381-82, 555-59, 613).

7 Similarly, the ALJ found Plaintiff's mental health symptom complaints were
8 out of proportion with her typically unmarkable presentation at treatment visits.
9 Tr. 21-23. While Plaintiff has reported difficulty leaving her home, and was noted
10 as being on the verge of tears in early 2014, the ALJ noted Plaintiff had normal
11 mood, affect, and memory, and her provider noted she was stabilizing at a modest
12 pace. Tr. 21 (citing Tr. 378, 384). The same records indicate Plaintiff was anxious
13 and fearful, Tr. 377, and "frequently on the verge of tears," Tr. 384. In June 2015,
14 Plaintiff reported worsening of her symptoms, but Plaintiff had a normal mental
15 status examination besides being somewhat anxious and initially having rapid
16 speech that slowed to normal, and by the end of 2015, she was noted as anxious
17 and depressed but talkative, cooperative, pleasant, and well-groomed. Tr. 21-22
18 (citing Tr. 353-54, 426). However, at the appointments, Plaintiff reported not
19 leaving her home, having nightmares and panic attacks, and her provider noted
20 Plaintiff was upset and tearful, and her "anxiety is not controlled at all." Tr. 353-

54, 426. Plaintiff's providers noted some abnormalities in 2016, including slightly agitated motor activity, pressured speech, impaired insight/judgement, and some paranoia, though mental status examinations generally demonstrated normal memory, attention, concentration, speech, and cognitive functioning. Tr. 22 (citing Tr. 499, 504, 510, 521, 540, 546). In 2017, Plaintiff continued to report difficulty leaving her home, and she continued to be tearful, depressed and anxious, with normal to rapid speech, tangential thoughts, and impaired judgment and insight but normal attention, concentration, memory and cognitive functioning. Tr. 22 (citing Tr. 579). In 2018, Plaintiff was scared and sad, with normal to rapid speech, her thoughts were less tangential, and the ALJ found her examinations were otherwise normal. Tr. 22 (citing Tr. 599, 626, 630).

While the ALJ summarized some of the relevant evidence and found the objective evidence is inconsistent with Plaintiff's symptom claims, an ALJ must consider all of the relevant evidence in the record and may not point to only those portions of the records that bolster his findings. *See, e.g., Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot selectively rely on some entries in plaintiff's records while ignoring others). The ALJ is not permitted to "cherry pick" from mixed evidence to support a denial of benefits. *Garrison*, 759 F.3d at 1017 n.23. As discussed herein, the ALJ cited portions of the record showing milder examination findings while the longitudinal record

1 showed more mixed results, leading to a characterization of the medical evidence
2 as a whole that is not supported by substantial evidence.

3 There are multiple references to Plaintiff's suicidal ideation throughout the
4 record, which the ALJ did not discuss. Tr. 420, 422, 546, 565, 601. Even at
5 appointments where Plaintiff reported she was doing "better," she was observed as
6 labile, crying, and tangential. Tr. 603-04. When Plaintiff was noted as "less"
7 tangential than previous visits, she still had continued anxiety, crying, and rapid
8 speech during the appointment, and endorsed thoughts of suicide. Tr. 602. While
9 the ALJ noted Plaintiff's examinations were "normal" in 2018 besides notes she
10 was scared and sad, with normal to rapid speech, and less tangential thoughts, Tr.
11 22, the ALJ cited to examinations that included multiple additional abnormalities
12 including notes Plaintiff was worried, crying, and endorsed suicidal ideation, Tr.
13 599, and she was depressed, anxious, and tearful, with moderate insight/judgment,
14 Tr. 626, 630. As the ALJ's characterization of the medical evidence as a whole is
15 not supported by substantial evidence, this was not a clear and convincing reason
16 to reject Plaintiff's symptom claims.

17 2. *Improvement with Treatment*

18 The ALJ found Plaintiff's improvement with treatment is inconsistent with
19 her symptom complaints. Tr. 23. The effectiveness of treatment is a relevant
20 factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§

1 404.1529(c)(3), 614.929(c)(3); *see Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d
2 1001, 1006 (9th Cir. 2006); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir.
3 2008) (a favorable response to treatment can undermine a claimant’s complaints of
4 debilitating pain or other severe limitations).

5 The ALJ noted Plaintiff had improvement in her symptoms when she was
6 taking her medication, including improvement in her ability to sleep, eat daily, and
7 leave her house. Tr. 23-24 (citing Tr. 509, 599, 606, 613, 639). At one of the cited
8 appointments, Plaintiff reported some of her medications were stolen and she was
9 taking the remaining medications as prescribed, and even with medication,
10 Plaintiff was scared, sad, crying during the appointment, with normal to rapid
11 speech, and though her thoughts were “less” tangential than the prior visit, they
12 remained tangential. Tr. 599. Plaintiff also reported continued suicidal ideation.
13 *Id.* At another cited appointment, while Plaintiff reported doing “better,” she also
14 stated it was one of her good days, yet Plaintiff remained anxious, with a
15 dysthymic mood, paranoia, and she had impaired insight and judgment. Tr. 503-
16 04. At another appointment, Plaintiff reported taking her medications as
17 prescribed, but reported “difficulty functioning in all major life roles,” difficulty
18 leaving the home and completing sentences, and she was fearful, crying, and labile
19 during the appointment, with tangential thoughts, paranoid thoughts, and rapid
20 speech. Tr. 606. At a November 2017 visit, Plaintiff reported doing better and

1 taking her medications, but Plaintiff remained anxious, tangential and difficult to
2 redirect, and paranoid, and she had only moderate insight and judgment. Tr. 639-
3 40. One cited visit was for treatment of carpal tunnel, during which Plaintiff
4 reported doing “better” and taking her medications, but there are no notes about
5 her psychological functioning. Tr. 613-14. The ALJ erred in finding that
6 Plaintiff’s improvement with treatment was inconsistent with her allegations, as the
7 finding is not supported by substantial evidence.

8 *3. Lack of Treatment*

9 The ALJ found Plaintiff’s lack of mental health treatment is inconsistent
10 with her symptom claims. Tr. 23-24. An unexplained, or inadequately explained,
11 failure to seek treatment or follow a prescribed course of treatment may be
12 considered when evaluating the claimant’s subjective symptoms. *Orn v. Astrue*,
13 495 F.3d 625, 638 (9th Cir. 2007). And evidence of a claimant’s self-limitation
14 and lack of motivation to seek treatment are appropriate considerations in
15 determining the credibility of a claimant’s subjective symptom reports. *Osenbrock*
16 *v. Apfel*, 240 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F.
17 App’x 45, *3 (9th Cir. 2009) (unpublished opinion) (considering why plaintiff was
18 not seeking treatment). When there is no evidence suggesting that the failure to
19 seek or participate in treatment is attributable to a mental impairment rather than a
20 personal preference, it is reasonable for the ALJ to conclude that the level or

1 frequency of treatment is inconsistent with the alleged severity of complaints.
2 *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental
3 health treatment is partly due to a claimant's mental health condition, it may be
4 inappropriate to consider a claimant's lack of mental health treatment when
5 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100
6 F.3d 1462, 1465 (9th Cir. 1996).

7 The ALJ noted Plaintiff discontinued her medication in August 2017, despite
8 encouragement to continue taking it. Tr. 23-24 (citing Tr. 453, 503, 646). Plaintiff
9 did not contact a provider for a refill until October 2017 when she again reported
10 the medications were helpful. Tr. 24 (citing Tr. 606, 639, 646). Plaintiff's mental
11 health provider was unable to reach her from September 22, 2017 through
12 December 2017. Tr. 24 (citing Tr. 658). From December 2017 through March
13 2018, Plaintiff reported taking her medication but with poor compliance at times.
14 Tr. 24 (citing Tr. 599, 601, 629).

15 While the ALJ discussed Plaintiff's periods in which she did not take her
16 medication or attend counseling appointments, the ALJ did not address any of the
17 reasons why Plaintiff was not compliant with treatment. Tr. 23-24. Plaintiff
18 reported she stopped taking her medications because she was feeling foggy due to
19 her medications, and restarted her medications on a lower dose. Tr. 646. She
20 reported not taking her medications once because they were stolen and she had not

1 been able to get them refilled, Tr. 599, and sometimes because she forgot to take
2 them and felt they would not help with her problems with her daughter, but agreed
3 to try to remember to take them daily. Tr. 629. Plaintiff also missed counseling
4 appointments due to transportation issues, being ill, feeling treatment was not
5 effective, difficulty connecting with her therapist, and due to being too anxious or
6 paranoid to leave her home. Tr. 53-56, 348, 441, 579, 622, 638. The ALJ erred in
7 failing to consider the reasons Plaintiff did not always comply with treatment. *See*
8 SSR 16-3p *8 (March 16, 2016), *available at* 2016 WL 1119029 (instructing that
9 an ALJ “will not find an individual’s symptoms inconsistent with the evidence in
10 the record on this basis without considering possible reasons he or she may not
11 comply with treatment or seek treatment consistent with the degree of his or her
12 complaints.”). On remand, the ALJ is instructed to consider the reasons Plaintiff
13 offered for her medication and treatment noncompliance.

14 While the ALJ offered an additional reason to reject Plaintiff’s symptom
15 claims, the Court finds the ALJ erred in his consideration of Plaintiff’s symptom
16 complaints for the reasons discussed *supra*. On remand, the ALJ is instructed to
17 incorporate Plaintiff’s reported limitations into the RFC or give clear and
18 convincing reasons, supported by substantial evidence, to reject Plaintiff’s
19 symptom claims.

B. Lay Witness Evidence

Plaintiff contends the ALJ erred in rejecting the lay witness statements of Bill Hughes, Martha Boersma, and E. Psoinos. ECF No. 19 at 14-17. An ALJ must consider the statement of lay witnesses in determining whether a claimant is disabled. *Stout v. Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). Lay witness evidence cannot establish the existence of medically determinable impairments, but lay witness evidence is “competent evidence” as to “how an impairment affects [a claimant’s] ability to work.” *Id.*; 20 C.F.R. § 416.913; *see also Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993) (“[F]riends and family members in a position to observe a claimant’s symptoms and daily activities are competent to testify as to her condition.”). If a lay witness statement is rejected, the ALJ ““must give reasons that are germane to each witness.”” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing *Dodrill*, 12 F.3d at 919).

Plaintiff’s husband, Bill Hughes, completed a third-party function report, wrote a letter, and testified at the hearing regarding Plaintiff’s functioning. Tr. 59-71, 271-78, 333. Mr. Hughes stated Plaintiff cannot interact well with others as she gets angry, emotional and begins to cry. Tr. 271. Mr. Hughes reported Plaintiff can generally handle tasks and personal care in her home, but needs assistance with anything outside of the home, including reminders to attend

1 appointments, she is accompanied when she leaves the home, and she is driven as
2 Plaintiff does not drive due to anxiety. Tr. 272-75. He reported Plaintiff cannot
3 handle stress, cannot handle money/bills, and has difficulty completing tasks,
4 concentrating, following instructions, understanding, remembering things, and
5 getting along with others. Tr. 274-77. He testified Plaintiff has periods where she
6 loses her temper then falls into a depression, and she experiences panic attacks. Tr.
7 66-67.

8 Plaintiff's mother, Martha Boersma, wrote a letter regarding Plaintiff's
9 functioning. Tr. 334. Ms. Boersma stated Plaintiff is afraid to leave her home,
10 experiences panic attacks and nightmares, and is very fearful, sad, and angry. *Id.*
11 The ALJ gave limited to weight to both Mr. Hughes and Ms. Boersma's
12 statements. Tr. 26. E. Psinos, a Social Security field office staff, observed
13 Plaintiff was nervous and had difficulty with her memory during her application
14 interview. Tr. 260. The ALJ did not address this statement.

15 First, the ALJ found the lay statements of Mr. Hughes and Ms. Boersma
16 were based on casual observations and not medical evidence. Tr. 26. "[M]edical
17 diagnoses are beyond the competence of lay witnesses and therefore do not
18 constitute competent evidence." *Nguyen*, 100 F.3d at 1467. However, lay
19 testimony "as to a claimant's symptoms or how an impairment affects ability to
20 work *is* competent evidence." *Id.* (emphasis in original). The lay statements

1 addressed lay observations and opinions, and did not include attempts by the lay
2 witnesses to give medical diagnoses or opinions. As such, this was not a germane
3 reason to reject the opinions.

4 Second, the ALJ found the lay statements restate Plaintiff's subjective
5 complaints, which the ALJ found inconsistent with the evidence. Tr. 26. Where
6 the ALJ gives clear and convincing reasons to reject a claimant's testimony, and
7 where a lay witness's testimony is similar to the claimant's subjective complaints,
8 the reasons given to reject the claimant's testimony are also germane reasons to
9 reject the lay witness testimony. *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d
10 685, 694 (9th Cir. 2009); *see also Molina*, 674 F.3d at 1114 ("[I]f the ALJ gives
11 germane reasons for rejecting testimony by one witness, the ALJ need only point
12 to those reasons when rejecting similar testimony by a different witness"). As the
13 Court finds the ALJ improperly rejected Plaintiff's symptom complaints, the ALJ
14 may not rely on those same reasons to reject the lay opinion. As such, this was not
15 a germane reason to reject the lay witness opinions.

16 While the ALJ offered an additional reason to reject the lay opinions of Mr.
17 Hughes and Ms. Boersma, the Court finds the ALJ erred in rejecting the opinions
18 for the reasons discussed *supra*. On remand, the ALJ is instructed to reconsider
19 the opinions of Mr. Hughes and Ms. Boersma, and incorporate the limitations into
20 the RFC or give germane reasons to reject the opinions. The ALJ is further

1 instructed to consider if E. Psoinos' statement amounts to an opinion, and if so,
2 incorporate the limitations into the RFC or give germane reasons to reject the
3 opinion.

4 **C. Medical Opinion Evidence**

5 Plaintiff contends the ALJ erred in his consideration of the opinion of
6 Michael Aquilino, LMHC. ECF No. 19 at 17-21. "Only physicians and certain
7 other qualified specialists are considered '[a]cceptable medical sources.'" *Ghanim*,
8 763 F.3d at 1161 (alteration in original); *see* 20 C.F.R. §§ 404.1513, 416.913
9 (2013).² However, an ALJ is required to consider evidence from non-acceptable
10 medical sources, such as therapists. 20 C.F.R. §§ 404.1513(d), 416.913(d) (2013).³
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14 ² The regulation that defines acceptable medical sources is found at 20 C.F.R. §§
15 404.1502, 416.902 for claims filed after March 27, 2017. The Court applies the
16 regulation in effect at the time the claim was filed.

17 ³ The regulation that requires an ALJ's consider opinions from non-acceptable
18 medical sources is found at 20 C.F.R. §§ 404.1502c, 416.920c for claims filed after
19 March 27, 2017. The Court applies the regulation in effect at the time the claim
20 was filed.

1 An ALJ may reject the opinion of a non-acceptable medical source by giving
2 reasons germane to the opinion. *Ghanim*, 763 F.3d at 1161.

3 On October 30, 2017, Mr. Aquilino completed a questionnaire on Plaintiff's
4 functioning. Tr. 595-97. Mr. Aquilino opined Plaintiff is not limited in her ability
5 to maintain socially appropriate behavior and adhere to basic standards of
6 neatness/cleanliness; moderately limited in her ability to remember locations and
7 work-like procedures, and sustain an ordinary routine without special supervision;
8 markedly limited in her ability to understand and remember very short and simple
9 instructions, carry out very short simple instructions, work in coordination with or
10 proximity to others without being distracted by them, make simple work-related
11 decisions, accept instructions and respond appropriately to criticism from
12 supervisors, get along with coworkers or peers without distracting them or
13 exhibiting behavioral extremes, respond appropriately to changes in the work
14 setting, and set realistic goals or make plans independently of others; and severely
15 limited in her ability to understand and remember detailed instructions, carry out
16 detailed instructions, maintain attention and concentration for extended periods,
17 perform activities within a schedule, maintain regular attendance and be punctual
18 within customary tolerances, complete a normal workday/workweek without
19 interruptions from psychologically based symptoms and to perform at a consistent
20 pace without an unreasonable number/length of rest periods, interact appropriately

1 with the general public, ask simple questions or request assistance, be aware of
2 normal hazards and take appropriate precautions, and travel to unfamiliar places or
3 use public transit. Tr. 595-96. Mr. Aquilino further opined Plaintiff has marked
4 limitations in her activities of daily living and extreme limitations in maintaining
5 social functioning and maintaining concentration, persistence or pace, and opined
6 Plaintiff would miss four or more days per month and be off task more than 30
7 percent of the time if she worked full-time. Tr. 597. The ALJ gave Mr. Aquilino's
8 opinion slight weight. Tr. 24. As Mr. Aquilino is not an acceptable medical
9 source, the ALJ was required to give germane reasons to reject the opinion. *See*
10 *Ghanim*, 763 F.3d at 1161.

11 First, the ALJ found Mr. Aquilino's opinion is inconsistent with the
12 objective evidence. Tr. 24. Relevant factors when evaluating a medical opinion
13 include the amount of relevant evidence that supports the opinion and the
14 consistency of the medical opinion with the record as a whole. *Lingenfelter v.*
15 *Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th
16 Cir. 2007). As discussed *supra*, the ALJ erred in his consideration of the objective
17 medical evidence. As such, this was not a germane reason to reject Mr. Aquilino's
18 opinion.

19 Second, the ALJ found Mr. Aquilino did not provide an adequate
20 explanation for his opinion, including not explaining how or if he considered

1 Plaintiff's substance abuse and improvement with treatment. Tr. 24. The Social
2 Security regulations "give more weight to opinions that are explained than to those
3 that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion
4 of any physician, including a treating physician, if that opinion is brief, conclusory
5 and inadequately supported by clinical findings." *Bray*, 554 at 1228. While Mr.
6 Aquilino's opinion is not accompanied by an explanation within the questionnaire,
7 the ALJ may not reject an opinion solely because it is a check-box questionnaire
8 when the questionnaire is supported by the treatment records. *See Garrison*, 759
9 F.3d at 1014 n. 17. As discussed *supra*, Mr. Aquilino's records contain multiple
10 abnormal mental status examinations that were not fully addressed by the ALJ.
11 The ALJ also found Mr. Aquilino did not address Plaintiff's functioning when
12 considering whether Plaintiff was continuing substance use or medication use. Tr.
13 24. However, Mr. Aquilino's questionnaire explicitly stated the opinion addresses
14 Plaintiff's functioning when she is free of alcohol or drug use. Tr. 595. The ALJ
15 noted a provider's familiarity with other evidence, including a claimant's substance
16 abuse, is a relevant factor to consider; Mr. Aquilino's treatment records mention
17 Plaintiff's substance use, demonstrating he is familiar with Plaintiff's use, and the
18 records discuss Plaintiff's use of medication. Tr. 602, 604, 606. This was not a
19 germane reason to reject the opinion.

1 Third, the ALJ noted Mr. Aquilino is not an acceptable medical source. Tr.
2 24. The ALJ is required to consider evidence from non-acceptable medical
3 sources. 20 C.F.R. §§ 404.1527, 416.927 (2012). Although an individual's status
4 as a medically acceptable source may impact the amount of deference the ALJ
5 gives to an opinion, the ALJ may not reject an opinion as to a claimant's
6 limitations because the opinion comes from a non-acceptable medical source. 20
7 C.F.R. §§ 404.1527, 416.927 (2012). The fact that Mr. Aquilino is not an
8 acceptable medical source is not a germane reason to reject the opinion. As such,
9 the ALJ erred in his consideration of Mr. Aquilino's opinion. On remand, the ALJ
10 is instructed to reconsider Mr. Aquilino's opinion and incorporate the limitations
11 into the RFC or give germane reasons to reject the opinion. The ALJ is further
12 instructed to call a psychological expert to assist with determining if Plaintiff's
13 impairments meet or equal a listing and what limitations her impairments cause.

14 Plaintiff has not argued for an award of immediate benefits, and the Court
15 finds further proceedings are necessary to address conflicting evidence and take
16 expert testimony. As such, the case is remanded for proceedings consistent with
17 this Order.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court concludes the
3 ALJ's decision is not supported by substantial evidence and is not free of harmful
4 legal error. Accordingly, **IT IS HEREBY ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **GRANTED**.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 21**, is **DENIED**.

7 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
8 **REVERSING** and **REMANDING** the matter to the Commissioner of Social
9 Security for further proceedings consistent with this recommendation pursuant to
10 sentence four of 42 U.S.C. § 405(g).

11 The District Court Executive is directed to file this Order, provide copies to
12 counsel, and **CLOSE THE FILE**.

13 DATED August 20, 2020.

14 s/Mary K. Dimke
15 MARY K. DIMKE
16 UNITED STATES MAGISTRATE JUDGE
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